Board of Alien Labor Certification
United States Department of Labor
Washington D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: 07/02/97
CASE NO:96-INA-066

In the Matter of:

BIOCRAFT LABORATORIES, INC.
Employer

On Behalf of:

RAMI NAGOLA
Alien

Appearance: Stephen M. Perlitsh, Esquire
New York, New York
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) (1990). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. *§ 656.27(c)*.

Statement of the Case

On March 15, 1994, Biocraft Laboratories, Inc. ("employer") filed an application for labor certification to enable Rami Nagola ("alien") to fill the position of Senior Chemist at the yearly salary of $ 35,875 (AF 146). The job duties are described as follows:

> Develop and validate chemical methods for the analysis of antibiotic, analgesic, gastrointestinal and cardiovascular drugs. Plan experiments, perform analyses and write reports for submission to FDA. Perform high pressure liquid, thin layer and ion chromatography, ultraviolet and infrared spectroscopy, and refractometry. Supervise and assist junior chemists at facility (AF 6).

The job requirements are a B.S. in Chemistry with one year of experience in the job offered or one and a half years of experience in the related occupation of Chemist.

On June 5, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.24(b)(2)(ii) which states that a CO shall consider a U.S. worker qualified for a job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner the duties involved in the occupation. Section 656.21(b)(6) further provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. The CO alleged that the employer failed to provide lawful job-related reasons for the rejection of twenty applicants who met the job requirements.

In rebuttal, dated July 27, 1995 , the employer argued that all applicants were rejected for lawful, job-related reasons. The employer stated that some of the applicants were rejected because they could not perform all of the job duties listed in Item 13 of ETA Form 750. Other applicants were rejected because they had been outside the field of Chemistry for a substantial period of time.

The CO issued the Final Determination on August 17, 1995 denying certification. The CO stated that the an applicant is to be considered qualified for a job opportunity if he or she meets the minimum requirements stated on the labor certification application. The CO therefore concluded that the employer's rebuttal argument conflicted with the mandate that employers list

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

the minimum requirements for the position in item 14. On September 19, 1995, the employer requested administrative review of denial of labor certification (AF 147).

Discussion

The issue presented by this appeal is whether the employer provides lawful, job-related reasons for rejecting several U.S. applicants. Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. *§656.21(b)(6)*. Furthermore, the job opportunity must have been open to any qualified U.S. worker. *§656.20(c)(8)*. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. *§656.2(b)*.

In general, labor certification is properly denied where the employer rejected U.S. applicants who meet the stated minimum requirements for the job. *Sterik Company*, 93-INA-252 (Apr. 19, 1994). *See also Cynthia Marks*, 93-INA-209 (Aug. 16, 1994); *Ronell's Stores, Inc.*, 93-INA-352 (Sept. 29, 1994); *International Printing Translation and Publishing Co.*, 93-INA-326 (Oct. 11, 1994). An employer unlawfully rejects U.S. workers who satisfy the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA 492 (Sept. 19, 1990).

In the instant case, the employer required applicants to have a B.S. in Chemistry with one year of experience as a senior chemist, or one and a half years of experience in the related occupation of chemist. The CO determined that 20 of the 37 applicants met these requirements, and therefore concluded that the employer did not provide lawful reasons for their rejection. The employer argued that several applicants were rejected because they did not possess experience as a "chemist for a pharmaceutical company and in analyzing antibiotic, analgesic, gastrointestinal & cardiovascular drugs" (AF 144). However, in offering this justification, the employer apparently confuses job requirements with the job description. While the job description states that the employee will "develop and validate chemical methods for the analysis of antibiotic, analgesic, gastrointestinal and cardiovascular drugs", there is no stated requirement that applicants must possess experience in developing drugs. Likewise, there is no requirement that applicants must possess experience as a chemist with a pharmaceutical company. Rather, the employer merely required that applicants possess a B.S. with one year of experience as a senior chemist, or one and a half years of experience as a chemist. Clearly, several applicants met the employer's stated minimum requirements, and we therefore hold that certification properly was denied.[2]

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[2] We should note that had the employer required experience with a pharmaceutical company in developing particular drugs, unduly restrictive requirements would have been at issue. This is true because the minimum requirements would have been narrowly tailored to meet the alien's work experience, which would thus require the employer to demonstrate that the requirements arose out of business necessity, or that they are normally required for the job in the United States, or that they are defined for the job in the Dictionary of Occupational Titles (DOT).

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

20 C.F.R. § 656.21 (b) (2).